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IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY

Plaintiff,

vs.

U.S. FISH AND WILDLIFE SERVICE, et al.

Defendants, and

THE NEWHALL LAND AND FARMING
 COMPANY,

Defendant-Intervenor.

Case No. 07-2380-JM-AJB

STIPULATED SETTLEMENT
 AGREEMENT AND ORDER

Plaintiff, Center for Biological Diversity (“CBD”), Federal Defendants, the United States Fish and Wildlife Service and Dirk Kempthorne, Secretary of the United States Department of the Interior (collectively “Service”), and Defendant-Intervenor the Newhall Land and Farming Company, by and through their undersigned counsel, state as follows:

WHEREAS, on December 16, 1994, the Service listed the arroyo toad, *Bufo californicus*, as endangered under the Endangered Species Act (“ESA”), 59 Fed. Reg. 64,859 (Dec. 16, 1994);

WHEREAS, pursuant to 16 U.S.C. § 1533(b)(5), on June 8, 2000, the Service issued a proposed critical habitat rule for the arroyo toad, 65 Fed. Reg. 36,512 (June 8, 2000);

1 WHEREAS, pursuant to 16 U.S.C. § 1533(b)(2) and 16 U.S.C. § 1533(b)(6)(A), on
2 February 7, 2001, the Service issued a final rule designating critical habitat for the arroyo toad,
3 66 Fed. Reg. 9,414 (Feb. 7, 2001);
4

5 WHEREAS, the U.S. District Court for the District of Columbia vacated and remanded
6 the Service's February 7, 2001 final critical habitat rule for the arroyo toad, Building Industry
7 Legal Defense Foundation v. Norton, 231 F. Supp. 2d 100, 102 (D.D.C. 2002);
8

9 WHEREAS, on April 28, 2004, the Service issued a new proposed critical habitat rule for
10 the arroyo toad, 69 Fed. Reg. 23,254 (Apr. 28, 2004);
11

12 WHEREAS, on February 14, 2005, the Service published revisions to the new proposed
13 critical habitat rule for the arroyo toad, 70 Fed. Reg. at 7,459 (Feb. 14, 2005);
14

15 WHEREAS, on April 13, 2005, the Service issued a final rule designating critical habitat
16 for the arroyo toad, 70 Fed. Reg. 19,562 (Apr. 13, 2005); 50 C.F.R. § 17.95(d);
17

18 WHEREAS, on July 20, 2007, the Service announced it would review and take further
19 action, as appropriate, on the April 13, 2005 final critical habitat designation for the arroyo toad;
20

21 WHEREAS, on December 19, 2007, CBD filed a complaint for declaratory and
22 injunctive relief, challenging the Secretary's April 13, 2005 designation of critical habitat
23 pursuant to 16 U.S.C. § 1540(g)(1)(C);
24

25 WHEREAS, the parties, through their authorized representatives, and without any
26 admission or final adjudication of the issues of fact or law with respect to CBD's claims, have
27 reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the
28 disputes set forth in CBD's complaint;

WHEREAS, the parties agree that settlement of this action in this manner is in the public
interest and is an appropriate way to resolve the dispute between them;

1 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS
2 FOLLOWS:

- 3 1. The Service agrees to re-consider its April 13, 2005 critical habitat designation for the
4 arroyo toad.
5
- 6 2. On or before October 1, 2009, the Service shall submit to the *Federal Register* a proposed
7 revised critical habitat rule for the arroyo toad, pursuant to 16 U.S.C. § 1533(a)(3)(A)(ii) and 16
8 U.S.C. § 1533(b)(5).
9
- 10 3. The Service will submit a final determination on the proposed revised critical habitat rule
11 for the arroyo toad, pursuant to 16 U.S.C. § 1533(b)(6), to the *Federal Register* by October 1,
12 2010.
- 13 4. Until the effective date of the final determination referenced in Paragraph 3, the existing
14 designation of critical habitat for the arroyo toad, see 50 C.F.R. § 17.95(d), shall remain in place
15 and effective.
16
- 17 5. The Order entering this Settlement Agreement (“Agreement”) may be modified by the
18 Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written
19 stipulation between the parties filed with and approved by the Court, or upon written motion filed
20 by one of the parties and granted by the Court. In the event that either party seeks to modify the
21 terms of this Agreement, including the deadlines for the actions specified in Paragraphs 2-3, or in
22 the event of a dispute arising out of or relating to this Agreement, or in the event that either party
23 believes that the other party has failed to comply with any term or condition of this Agreement,
24 the party seeking the modification, raising the dispute or seeking enforcement, shall provide the
25 other party with written notice of the claim. The parties agree that they will meet and confer (in-
26 person not required) at the earliest possible time in a good-faith effort to resolve the claim before
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28

1 pursuing relief from the Court. If the parties are unable to resolve the claim after the meet and
2 confer, either party may pursue relief from the Court.

3 6. No party shall use this Agreement or the terms herein as evidence of what does or does
4 not constitute lawful designation of critical habitat, in any other proceeding involving the
5 Service's implementation of the ESA.
6

7 7. Defendants agree that Plaintiff is the "prevailing party" in this action, and agree to pay to
8 Plaintiff reasonable attorneys' fees and costs, pursuant to Section 11(g) of the ESA, 16
9 U.S.C. § 1540 (g). Therefore, Defendants agree to settle all of Plaintiff's claims for costs and
10 attorneys' fees in the above-captioned litigation for a total of \$9,299.88. A check will be made
11 payable in that amount to Plaintiff's undersigned counsel, Center for Biological Diversity, c/o
12 Lisa T. Belenky, 351 California Street, Suite 600, San Francisco, CA 94104.
13

14 8. Defendants agree to submit all necessary paperwork for the processing of the attorneys'
15 fee award to the Department of the Treasury's Judgment Fund Office, pursuant to 16 U.S.C.
16 § 1540(g)(4), within ten (10) business days of receipt of the court order approving this
17 stipulation.
18

19 9. Plaintiff agrees to accept payment of \$9,299.88 in full satisfaction of any and all claims
20 for attorneys' fees and costs of litigation to which Plaintiff is entitled in the above-captioned
21 litigation, through and including the date of this agreement.

22 10. Plaintiff agrees that receipt of this payment from Defendants shall operate as a release of
23 Plaintiff's claims for attorneys' fees and costs in this matter, through and including the date of
24 this agreement.
25

26 11. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred
27 subsequent to this agreement arising from a need to enforce or defend against efforts to modify
28

1 the underlying schedule outlined in Paragraphs 2-3, or for any other unforeseen continuation of
2 this action.

3 12. By this agreement, Defendants do not waive any right to contest fees claimed by Plaintiff
4 or Plaintiff's counsel, including the hourly rate, in any future litigation, or continuation of the
5 present action. Further, this stipulation as to attorneys' fees and costs has no precedential value
6 and shall not be used as evidence in any other attorneys' fees litigation.

7
8 13. No provision of this Agreement shall be interpreted as, or constitute, a commitment or
9 requirement that Defendants take action in contravention of the ESA, the Administrative
10 Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Nothing
11 in this Agreement shall be construed to limit or modify the discretion accorded to the Service by
12 the ESA, the APA, or general principles of administrative law with respect to the procedures to
13 be followed in making any determination required herein, or as to the substance of any final
14 determination.

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16 14. Defendants assert that no provision of this Agreement shall be interpreted as, or
17 constitute, a commitment or requirement that Defendants are obligated to spend funds in
18 violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. In response, Plaintiff asserts that this
19 Agreement does not create a conflict with the Anti-Deficiency Act because the duty to designate
20 critical habitat is required in non-discretionary terms by the ESA and because the Anti-
21 Deficiency Act would not excuse compliance with a pre-existing court-approved Agreement.
22 Plaintiff intends to assert this position if the Service fails to comply with the terms of this
23 Agreement for reasons of insufficient appropriations. Defendants reserve all legal and equitable
24 defenses to such a claim.

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26
27 15. The parties agree that this Agreement was negotiated in good faith and constitutes a
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1 settlement of claims that were vigorously contested, denied, and disputed by the parties. By
2 entering into this Agreement the parties do not waive any claim or defense.

3 16. The undersigned representatives of each party certify that they are fully authorized by the
4 party or parties they represent to agree to the Court's entry of the terms and conditions of this
5 Agreement and do hereby agree to the terms herein.

6
7 17. The terms of this Agreement shall become effective upon entry of an order by the Court
8 ratifying the Agreement.

9 18. Upon approval of this Agreement by the Court, all counts of Plaintiff's Complaint shall
10 be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1), and
11 Defendant-Intervenor stipulates to the withdrawal of its intervention.

12
13 19. Notwithstanding the dismissal of this action, the parties hereby stipulate and respectfully
14 request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement
15 and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of
16 Am., 511 U.S. 375 (1994).

17 Dated: June 5, 2008

18
19 /s/ Lisa T. Belenky
20 Lisa T. Belenky
21 CENTER FOR BIOLOGICAL DIVERSITY

22 Attorney for Plaintiff

23 RONALD J. TENPAS
24 Assistant Attorney General
25 JEAN E. WILLIAMS, Section Chief
26 LISA L. RUSSELL, Assistant Section Chief

27 /s/ Meredith L. Flax
28 MEREDITH L. FLAX, Trial Attorney
U.S. Department of Justice

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Wildlife & Marine Resources Section
Environment & Natural Resources Division

Attorneys for Defendants

/s/ David P. Hubbard
David P. Hubbard
Mark J. Dillon
Rachel C. Cook
GATZKE DILLON & BALLANCE LLP

Attorneys for Defendant-Intervenor

ORDER

The terms and conditions of this Stipulated Settlement Agreement are hereby adopted as an enforceable ORDER of this Court, and this matter is hereby DISMISSED with prejudice.

Dated: this _____ day of _____ 2008.

UNITED STATES DISTRICT JUDGE